REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3625/2007

In the matter between:

OBM ENGINEERING & PETROLEUM DISTRIBUTORS CC **PLAINTIFF**

and

TOTAL NAMIBIA (PTY) LTD **DEFENDANT**

Neutral citation: *OBM Engineering & Petroleum Distributors CC v Total Namibia (Pty) Ltd* (I 3625/2007) [2013] NAHCMD 20 (28 January 2013)

Coram: MILLER AJ

Heard: **26 November 2012**

Delivered: **28 January 2013**

Flynote: Application to rectify written agreement alleged to be ambigious – Words used by the parties in the agreement to be given their ordinary meaning unless that would lead to an absurdity – Application refused.

Summary: The plaintiff and defendant concluded a written agreement – Defendant claims that the words “source documents” and “verified source documents” was intended to exclude delivery notes – Agreement therefore ambigious,

Held that determining what the intention of the parties was, requires of the Court to give the words used their ordinary meaning unless that would result in some

absurdity – The intention of the parties is to be gathered from how it is expressed in the agreement.
Held that in casu giving the words used their ordinary meaning no ambiguity arises – Application refused.

ORDER

The application is dismissed with costs, such costs will include the costs of one instructing counsel and two instructed counsel.

JUDGMENT

MILLER AJ :

[1] The parties are embroiled in litigation which dates back to the year 2007. Thus far all attempts to resolve the matter proved to be elusive. Whether or not the application I am now called upon to decide will facilitate the process remains to be seen.

Background

[2] The matter originated in October 2003 when the parties concluded a written agreement in terms whereof the defendant agreed to supply fuel to the plaintiff at pre-determined prices. In addition the defendant debited the plaintiff with an additional amount referred to in the papers as the “transport differential”. This agreement endured until August 2007, when it was terminated.

[3] Shortly thereafter and during December 2007 the plaintiff issued summons against the defendant. The basis of the claim at that stage was that it, the plaintiff, had been induced to pay the transport differential. As a result of a misrepresentation made to it by the defendant that the transport differential could be claimed back from

the Government of Namibia. This representation it alleged was false. As a consequence the plaintiff claimed payment of the amount of N$4 609 940.72 together with certain additional relief.

[4] In response, the defendant delivered a plea and a counterclaim. It denied that any misrepresentation had been made, apart from alleging that the alleged representation made was a mistake and could in any event not have caused any damage to the plaintiff because it had been made after the agreement was terminated. In the first of the two counterclaims the defendant claimed payment of the amount of N$265, 876.22 which it alleged was due as a result thereof that it had intermittently under claimed the transport differential. In the second counterclaim the defendant claimed payment of the amount of N$3 573 465.22 which it alleged, the plaintiff owed the defendant in respect of the purchase of fuel products which it had failed to pay.

[5] The plaintiff subsequently amended paragraph 9 of its claim dealing with the alleged misrepresentation by adding an allegation that it was compelled to pay the amounts claimed by the defendant as due and payable under the threat of having its account suspended if it did not pay the amounts claimed by the defendant in the invoices and reconciliations it prepared and submitted to the plaintiff.

[6] In respect of the counterclaim in respect of purchase of fuel products delivered to the plaintiff the plaintiff denied that it owed the defendant anything in that regard. I mention in passing that consequent upon the amendments the plaintiffs' claim escalated to N$6 760 920.88.

[7] The matter was then enrolled for hearing before Hoff J during October 2010.

[8] Shortly before the hearing and on 19 October 2010, the defendant launched an application in terms of Rule 33 (4) of the Rules of the High Court. In that application it sought an order that the question as to whether the defendant was in

law entitled to raise the transport differential, be separated. It contended that once that issue was resolved what remained was an accounting exercise.

[9] This application became opposed. Having heard argument on the application Hoff J reserved his judgment until the next day at 10h00.

[10] However as matters turned out, and prior to a ruling issued by Hoff J, the legal representatives of the parties convened to explore a possible settlement of the matter.

[11] The upshot of that was that a written agreement of settlement was concluded and signed by the parties. The agreement was then made an order of court. It is this agreement which is the subject of the present proceedings before me. The agreement reads as follows:

'AGREEMENT

GENERAL

1. The court will be requested to postpone the hearing *sine die* and to incorporate this agreement in the aforesaid order.

2. The accountants for the parties will be instructed to verify all transactions underlying the current account of plaintiff with defendant (with reference to the source documents) in order to determine, by agreement, any liability of defendant to plaintiff or *vice versa* in accordance with the following:

2.1 All litres transported by plaintiff from Walvis Bay to Otjiwarongo to be calculated at 14 c / litre.

2.2 All litres delivered and transported by plaintiff from Otjiwarongo to defendant's customers at the bulk transport rate of 14 c / litre for the initial period p to 31 June 2006 and thereafter at the bulk transport rate of 15 c / litre as from 1 July 2006.

2.3 In respect of the same litres referred to in clause 2.2 above, a delivery / handling fee as stipulated in clause 7.2 of the agreement attached as annexure “A” to plaintiff’s particulars of claim (annexure “A”).

2.4 In respect of the rebate, as per clause 7.1 of annexure “A”.

2.5 The COC to be debited and the same COC to be credited in respect of purchases by plaintiff and deliveries to defendant’s customers.

OPENING BALANCE

3. Plaintiff deems the opening balance to be zero as at 1 June 2005.

4. Defendant is entitled to prove a different opening balance with reference to source documents, but subject thereto that such source documents will only relate to the contract period in annexure “A”.

DEFINITION OF COC PRICE

5. The COC price in clause 2.5 above shall be the price as debited by defendant in respect of upliftment at Walvis Bay.

PLAINTIFF’S LUBRICATION CLAIM

6. Defendant shall pay an amount to be determined from annexure “Z” to plaintiff’s amended particulars of claim but limited to the time period stipulated in paragraph 14 of plaintiff’s amended particulars of claim, plus interest at the Namibian *mora* rate, calculated as from 1 September 2007 to date of final payment.

7. The result of the lubrication claim shall not affect the liability for costs referred to below and any amount found to be due shall be paid within fourteen (14) calendar days of final determination.

TIME PERIODS

8. Plaintiff requires time until 30 November 2010 to reconsider its verification as summarized in annexure “A” to the summary filed in respect of Mr. Dreyer’s expert summary.

9. Defendant’s legal practitioner will deliver to plaintiff’s legal practitioner on or before 31 January 2011 defendant’s response to plaintiff’s said verification.

10. Both plaintiff’s amendment, if any, and defendant’s response, shall be valid only insofar as supported by verified source documents.

11. On or before 15 February 2011, or such later date as may be requested by plaintiff on reasonable notice, a meeting will be held between the parties’ legal presentatives in Windhoek at a venue and time to be agreed upon for the following purpose:

11.1 To debate any issues raised in defendant’s response and by plaintiff in reply to defendant’s response (to be provided to defendant at least seven (7) calendar days prior to such meeting, if any).
11.2 To compile a list of issues, if any, which the parties are unable to resolve.
11.3 The trial will continue for the purpose of adjudicating any remaining issues, including the costs of such litigation.

DEFAULT

12. The plaintiff does not deliver its additional verification on or before 30 November 2010, annexure “A” will stand as plaintiff’s verification.

13. If defendant does not deliver its response on or before 31 January 2011, plaintiff’s verification shall be accepted.

INTEREST

14. Interest on the outstanding balance determined as envisaged in clause 2 above, will be calculated in accordance with the Namibian *mora* rate, calculated as simple interest as from 1 September 2007 to date of final payment.

COSTS

15. The party ultimately liable for payment to the other shall be liable for costs on the following bases:

15.1 Namibian party and party scale.

15.2 Private taxation by a tax consultant in Windhoek to be agreed upon between the parties.

15.3 In the event of defendant being entitled to costs, one instructing and two instructed counsel, plus the actual fees billed by the correspondent (Fisher, Quarmby & Pfeifer).

15.4 In the event of plaintiff being entitled to costs, one instructing and two instructed counsel.

15.5 For purposes of any taxation or agreement, the parties agree that the parties' experts are qualified and necessary witnesses.

PAYMENT

16. Payment of the amount envisaged in clause 2 above shall be made within fourteen (14) calendar days of final determination thereof, which payment shall not be affected by the outcome of any litigation envisaged in clause 11.3 above.

17. Payment of the amount envisaged in clause 15 above shall be made within fourteen (14) calendar days of taxation or agreement.

Dated at WINDHOEK on this 27 day of October 2010.

FOR AND ON BEHALF OF THE PLAINTIFF

WITNESS

WITNESS

Dated at WINDHOEK on this 27 day of October 2010.

FOR AND ON BEHALF OF THE DEFENDANT

WITNESS

WITNESS'

[12] In the result the matter was postponed *sine die* to enable the parties to give effect to the agreement, and to continue if needs be on any remaining issues which might still remain thereafter.

[13] In the interim and subsequent to the implementation of the judicial case management system, the matter was assigned to me as the managing judge.

[14] A number of case management meetings ensued during the course of which settlement of the matter a referral to private arbitration were mooted, none of which materialized.

[15] Ultimately the defendant intimated that it intended to move an application to rectify the settlement agreement and the order issued by Hoff J pursuant thereto. I accordingly made the necessary orders and the matter was enrolled for hearing on 20 November 2012.

[16] I heard argument from Mr. du Toit SC who was assisted by Mr. Meiring on behalf of the defendant and by Mr. Heathcote SC who was assisted by Ms. de Jager who appeared on behalf of the plaintiff. I record my appreciation to all counsel for the heads of argument they prepared and for the submissions made during the course of the hearing.

[17] I now turn to consider the defendant's application. I will continue to refer to the parties as the plaintiff and the defendant respectively.

<u>The Application</u>

[18] The relief sought by the defendant is the following:

'1. Declaring that any verification of transactions referred to in the agreement between the parties dated 27 October 2010 which relies on invoices, credit notes and debit notes properly complies with the requirements of the agreement (and the court order pursuant thereto) and need not be additionally supported by any proof of delivery.

Alternatively to paragraph 1:

2. Declaring that the agreement purportedly arrived at between the parties on 27 October 2010 is of no force or effect, and rescinding the court order relating thereto.

Alternatively to paragraph 1 and 2:

3. Rectifying and varying the agreement between the parties dated 27 October 2010, and the court order pursuant thereby by the insertion of the following words after the words "source documents" or "verified source documents" wherever they appear, "(which need only to be invoices, debit notes or credit notes).")

[19] In essence and as was foreshadowed the defendants' heads of argument, the defendant contends that the accounting exercise contemplated by the agreement must be done with reference to invoices, credit notes and debit notes only. The defendant contends that delivery notes should be left out of the equation contrary to what the plaintiff contends.

[20] What this amounts to is that the phrases "source documents" and "verified source documents" where it appears in the agreement is ambigious and must be construed to exclude delivery notes. As an alternative submission the defendant contends that if it was intended that delivery notes were to be regarded as source documents it would not have consented thereto. Consequently it is submitted there was no consensus between the parties. This apparent belief is premised on the fact that, so it is submitted, on the pleadings the amount of fuel delivered to the plaintiff was never an issue and consequently any reference to delivery notes was

superfluous. Consequently its intention when entering into the agreement was that delivery notes would not need to be referred to.

The Legal Principle Applicable

[21] Firstly I agree with the submissions made on behalf of the defendant that should the agreement be found to be ambigious and in need of rectification, so would the court's order issued pursuant thereto.

[22] Secondly and insofar as evidence of the surrounding circumstances and negotiations which culminated in the conclusion of the written agreement are admissible and relevant, I will on the papers before me proceed to accept as correct the facts admitted by the plaintiff and its version of the disputed facts. I do so in accordance with the well established and so called Plascon Evans rule.

[23] As a general role where terms of a contract are not ambigious in relation to the intention of the parties, extraneous evidence of what the parties intended is not admissible. Instead in those circumstances the words used in the agreement should not be given their full effect.
Hodrais v Freeman and Freeman 1948 (3) SA 720 (W)
Sonorep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd 1981 (1) SA 889 (N)
In *Scottish Union and National Insurance Co. Ltd v Native Accruiting Corp. Ltd* 1934 AD 458 the Court formulated the approach as follows:

"It has been repeatedly in our Courts that in construing every kind of written contract the Court must give effect of the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words their plain ordinary and popular meaning unless it appears clearly from the context that both the parties intended them to bear a different meaning. If therefore there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves suggest."

In *Southline Retail CC v BP Namibia (Pty) Ltd* 2011 (2) NR 562 (SC) The Supreme Court held that:

> "The rule of interpretation is to ascertain not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract."

[24] It follows that as a first step I must consider the agreement giving the words used their ordinary grammatical and popular meaning. If having done so, I come to the conclusion that there is no ambiguity or absurdity or repugnance with the rest of the agreement and the purpose thereof, that will be the end of the enquiry. Any reference to extraneous evidence will not be admissible.

Applying the Law to the Facts

[25] It remains to consider the agreement reached against the applicable legal principles I dealt with.

[26] The agreement states its underlying purpose in express terms in paragraph 2 thereof.

[27] It expressly states that the purpose of the exercise the agreement provides for is to:

(a) Verify all the transactions underlying the current account of the plaintiff with the defendant.
(b) The verifying process will be done with reference to the source documents to determine.

(c) By agreement any, liability of defendant to plaintiff or vice versa (my emphasis).

[28] It is immediately apparent that the parties chose to use terminology much wider than a more confined issue relating only to the transport differential.

[29] Provision is then made for the parties to be provided time to the plaintiff to verify its calculation and for the defendant to respond thereto with reference only to verified source documents.

[30] The phrases “source documents” and “verified source documents” are phrases of wide import.

[31] In the context of the agreement as a whole it will be any document which relates to or establish the existence of a transaction concluded. There is nothing in the agreement which suggest that a delivery note, which plainly in a source document in relation to a transaction concluded between the parties is to be excluded. If the parties had intended to exclude delivery notes I have no doubt that they would have made provision for that in the agreement.

[32] It would seem to me that the invoices could only be verified with reference to inter alia the delivery notes from which the invoices were prepared.

[33] I conclude in the result that the agreement is not ambigious and that the interpretation contacted for by the defendant is not borne out by the words used in the agreement.

[34] In the result the application is dismissed with costs which will include the costs of one instructing and two instructed counsel.

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P J MILLER

Judge

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APPEARANCES

PLAINTIFF :	R HEATHCOTE SC (with him B de Jager) Instructed by Ellis Shilengudwa Incorporated, Windhoek
DEFENDANT:	S DU TOIT SC (with him JJ Meiring) Instructed by Fisher, Quarmby & Pfeifer, Windhoek.